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ARTICLE

State Continuity, Self-Determination and Sea-Level Rise

Alex Green[1,2] and Margaretha Wewerinke-Singh[3,4]

[1]Faculty of Law, Chinese University of Hong Kong, Hong Kong SAR, People's Republic of China; [2]Academic Associate, 23 Essex Street Chambers, London, UK; [3]Faculty of Law, University of Amsterdam, Amsterdam, the Netherlands and [4]Of Counsel, Blue Ocean Law, Hagåtña, Guam
Corresponding author: Alex Green; Email: aggreen@cuhk.edu.hk

Abstract
This article contends that anthropogenic sea-level rise seriously undermines the exercise of self-determination by peoples living in Small Island Developing States (SIDS). Moreover, it argues that the effects of this would be severely exacerbated if the international community were to reject the possibility of statehood enduring notwithstanding total submergence, the complete loss of inhabitable land or the mass exodus of extant populations. In support of the claims made by several SIDS themselves, this article provides an analysis focused upon the relationship between the law of State continuity, on the one hand, and the peremptory norm of self-determination on the other. Ultimately, this analysis advances an understanding of State continuity and sea-level rise that favours existential resilience, making any future losses of statehood contingent upon voluntary dissolution by affected States.

Keywords: public international law; statehood; self-determination; sea-level rise; climate change

1. Introduction

This article concerns the connection between self-determination and State continuity under international law, with reference to Small Island Developing States (SIDS). Anthropogenic sea-level rise seriously affects self-determination within such States and has been mooted to threaten their very existence under contemporary international law. The perceived threats are twofold. First, insofar as statehood requires land-based territory, total submergence is argued to disqualify affected States from maintaining their statehood.[1] This trades on the widespread assumption that maritime zones cannot

[1] K Marek, *Identity and Continuity of States in Public International Law* (Librairie E Droz 1954) 7; M Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 EJIL 142, 159; M Shaw, *International Law* (CUP 2014) 151; JG Stoutenburg, *Disappearing Island States in International Law* (Brill 2015) 251–66; E Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' (2018) Brill Open Law 1, 4; AG Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50 StanJInt'lL 1, 27; O Sharon, 'To Be or Not

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exist autonomously from land.[2] Second, insofar as statehood cannot exist without a permanent population, a total exodus would arguably disqualify affected SIDS.[3] Since climate change-induced harms (such as declining potable water, increased soil salinisation and ecosystem degradation) have already rendered parts of SIDS' territories uninhabitable,[4] the latter threat appears particularly acute.

The authors believe that these two perceived threats do not hold up to scrutiny. Although the physical harms of sea-level rise are undeniable, their legal implications are less clear. There is an emerging body of State practice which supports the proposition that sea-level rise does not create an existential threat to SIDS—at least, not in a legal sense. For instance, a 2023 Pacific Islands Forum (PIF) Declaration stated that 'international law … does not contemplate its demise in the context of climate change-related sea-level rise',[5] while the Alliance of Small Island States (AOSIS) declared in 2024 that, notwithstanding sea-level rise, 'consistent with the right to self-determination, the statehood and sovereignty of SIDS … will continue'.[6] This article examines these statements, together with other relevant instances of practice, throughout the discussion.

The crux of the argument to be developed is that the principle of self-determination provides a plausible basis for concluding that statehood endures notwithstanding total submergence, uninhabitability or exodus. To demonstrate this, this article considers self-determination in conjunction with three complementary legal elements: the idea of 'effectiveness'; the presumption of State continuity; and the law governing State recognition.[7] All three constitute essential pillars of the law governing State continuity and extinction. In each instance, it is argued that the peremptory status of self-determination requires that it be used as a hermeneutic lens, leading to a more liberal account of State continuity. Although this analysis focuses on self-determination's interpretative implications, it recognises that self-determination also serves as a freestanding basis for legal obligations in relation to sea-level rise.[8] Integrating these

to Be: State Extinction through Climate Change' (2021) 51 EnvLaw 1041, 1065; C König, *Small Island States and International Law: The Challenge of Rising Seas* (Routledge 2022) 33–35.

[2] Stoutenburg (n 1) 253; *North Sea Continental Shelf (Germany v Denmark; Germany v the Netherlands)* (Merits) [1969] ICJ Rep 3, para 96; cf A Green, 'Three Reconstructions of "Effectiveness": Some Implications for State Continuity and Sea-level Rise' (2024) 44 OJLS 201, 213.

[3] Green, ibid 268; König (n 1) 64–68; J McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 124; D Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) 14 MJIL 346, 359; A Camprubí, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 117–47; D Rothwell, *Islands and International Law* (Hart 2022) 244; M Stewart, 'Cascading Consequences of Sinking States' (2023) 59 StanJInt'lL 131, 141–42.

[4] See, e.g. S Pascoe, 'Sailing the Waves on Our Own: Climate Change Migration, Self-Determination and the Carteret Islands Climate Displacement in the Pacific' (2015) 15 QUTLR 72.

[5] PIF, '2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise' (9 November 2023) paras 12–13.

[6] UNGA, 'Annex to Letter dated 9 October 2024 from the Permanent Representative of Samoa to the United Nations addressed to the Secretary General' (24 October 2024) UN Doc A/79/548, para 3.

[7] We do not address recognition of governments.

[8] *Obligations of States in Respect of Climate Change* (Request for Advisory Opinion) (Written Comments of the Republic of Vanuatu, 15 August 2024) paras 138–139, 199, 204.

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insights into a coherent account of State continuity underscores the enduring resilience of SIDS as legal and political entities in the face of climate change.

The argument begins by addressing the nature of self-determination, its connection to legal statehood and the dangers to its enjoyment posed by sea-level rise (Section 2). It then turns to the principle of effectiveness, the application of which to the anticipated physical effects of catastrophic sea-level rise is often thought to support the conclusion that statehood would inevitably lapse in the event of mass exodus, uninhabitability or total submergence (Section 3). The authors take it as a premise that, as a peremptory norm, all other norms of international law, including effectiveness, must be interpreted coherently with self-determination. On this basis, it is argued that a capacious conception of effectiveness might be available, which, if generally accepted, would bolster SIDS's legal-existential resilience. Next, the argument considers the presumption of State continuity and its relationship to self-determination: first, by developing a normative case for why statehood should be presumed to continue notwithstanding sea-level rise until it is voluntarily dissolved and, subsequently, by surveying contemporary practice supporting this proposition (Section 4). As with effectiveness, it is argued that the presumption of State continuity must be interpreted so as to respect and safeguard self-determination. Finally, the argument uses self-determination to make an important distinction within the law of State recognition (Section 5). This is between initial recognition, which operates as a liberty subject to legal restrictions, and the continued provision of recognition once granted, which the authors contend to be obligatory in circumstances of sea-level rise unless respect for self-determination itself requires otherwise. In almost all conceivable circumstances, the latter occurs only after consensual dissolution of the State in question or volitional merger with some other entity. Such emphasis upon consent as a precondition for dissolution is timely, given that similar arguments have been raised in recent proceedings before the International Court of Justice (ICJ or Court)[9] and within the International Law Commission (ILC).[10]

[9] ibid Verbatim Record CR 2024/35 1 (2 December 2024) 114. But not, unfortunately, within the Advisory Opinion itself, see: *Obligations of States in respect of Climate Change* (Advisory Opinion) (General List No 187, 23 July 2025) para 363. In that paragraph of the Opinion, which was the only treatment that State continuity received, the Court commented: 'In the view of the Court, once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood.' This is logically consistent with everything argued in this article *and* with the vast preponderance of State practice on State continuity. The issue, however, lies in the highly parsimonious language that the Court used. The claim that the loss of one constituent element does not necessarily result in statehood lapsing is, and has been for some considerable time, uncontroversial to the point of being legally trite. Such a modest legal claim encompasses, for example, the generally accepted point that a loss of governmental control over a particular territory does not necessarily result in statehood lapsing (see Section 3.1), and so does very little to advance understanding of State continuity beyond that point. It also does not contemplate situations in which more than one constituent element is lost: that is, both territory and population. This was explicitly acknowledged in the Separate Opinion of Judge Aurescu, at paras 21 to 22 (see also the Separate Opinion of Vice President Sebutinde, at para 8). As such, this article does not engage substantively with the Advisory Opinion beyond this point: there is, unfortunately, very little of substance concerning the interaction between sea-level rise and State continuity with which to engage.

[10] International Law Commission (ILC), 'Report of Study Group on Sea-Level Rise in relation to International Law' (15 July 2024) UN Doc A/CN.4/L.1002, para 30.

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2. Self-determination and the law of statehood

Self-determination 'is one of the essential principles of contemporary international law',[11] as well as 'a fundamental human right … [with] broad scope'.[12] It reflects the normative importance of peoples freely determining their cultural, economic, political and social futures.[13] 'Peoples' encompass the populations of contemporary States,[14] those of non-self-governing and colonial territories,[15] minorities and Indigenous peoples.[16] Crucially, self-determination as a right and principle possesses peremptory status,[17] which has at least two implications for the law of State continuity. First, insofar as self-determination directly correlates to distinct obligations, those obligations will be non-derogable. Second, even where this is not so—because, for example, there is insufficient State practice to ground a sufficiently concrete obligation—the relevant legal norms will still need to be interpreted coherently with self-determination as an overarching principle. It is upon this need for principled coherence that much of the analysis in this article turns. In this section, the authors consider the connection between self-determination and legal statehood, before exploring some ways in which sea-level rise undermines its enjoyment, thereby emphasising the normative importance of interpreting the law of State continuity coherently with self-determination.

First, a few further words on self-determination as a peremptory norm are necessary. In its Advisory Opinion on the *Occupied Palestinian Territory*,[18] the ICJ proclaimed the peremptory character of self-determination 'in cases of foreign occupation',[19] affirming earlier characterisations of it as both 'essential' and 'basic'.[20] Notwithstanding this

[11] *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90, para 29.

[12] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 144.

[13] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 173 (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 1; Committee on the Elimination of Racial Discrimination, 'General Recommendation No 21' (8 March 1996) UN Doc CERD/48/Misc.7/Rev.3, para 4; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 5; Human Rights Committee (HRC), 'General Comment No 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples' (13 March 1984) para 2; S Anaya, *Indigenous Peoples in International Law* (OUP 2004) 74.

[14] UNGA Res 2625 (XXV) (1974) UN Doc A/RES/2625(XXV), principle 5; A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 141–47; J Crawford, *The Creation of States in International Law* (OUP 2007) 52–55; A Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024) 72–75.

[15] ICCPR (n 13) art 1; ICESCR (n 13) art 1; HRC, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee' (3 August 1994) UN Doc CCPR/C/79/Add.38, para 6.

[16] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2007) UN Doc A/RES/61/295 (UNDRIP) arts 3–5; S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2005) 146.

[17] *Chagos Archipelago* (n 12) paras 48–82, 233 (Separate Opinion of Judge Robinson).

[18] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) (General List No 186, 19 July 2024).

[19] ibid para 234.

[20] ibid paras 231–232.

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apparent caution, significant evidence suggests that self-determination as such, both as a right and a principle, has peremptory status. In his Separate Opinion, Judge Gómez Robledo endorsed that status,[21] and averred the ICJ to have recognised 'its full axiological nature, as a concept that reflects and, at the same time, inspires a world view'.[22] Judge Robinson, in his Separate Opinion in the Court's Advisory Opinion on the *Chagos Archipelago*,[23] conducted an extensive study of self-determination's peremptory status, relying upon the approach taken by the Court in *Questions relating to the Obligation to Prosecute or Extradite*,[24] and grounding that status upon the widespread endorsement of States,[25] the inclusion of self-determination within instruments of universal application[26] and treatment by both international bodies and scholars.[27] In the authors' view, this case is fully made out.[28] Self-determination appears in numerous treaties,[29] declarations and other instruments.[30] Furthermore, as Judge Gómez Robledo emphasises, it helps to make normative sense of international law as a single, unified order, operating not only prescriptively but also as a foundational value which aids in the interpretation and application of concrete rules. Even prior to its codification in the United Nations (UN) Charter,[31] self-determination influenced the safeguarding of local language and culture,[32] which were described by the Commission of Rapporteurs in the *Åland Islands* dispute as 'the very soul of a people'.[33]

In this article, the authors take the peremptory status of self-determination to require other norms to be interpreted and applied coherently with that principle, insofar as

[21] ibid paras 18–28 (Separate Opinion of Judge Gómez Robledo).

[22] ibid para 28.

[23] *Chagos Archipelago* (n 12).

[24] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, para 99.

[25] *Chagos Archipelago* (n 12) para 71 (Separate Opinion of Judge Robinson).

[26] ibid para 72.

[27] ibid para 73, citing, for example, various multilateral treaties, UN resolutions and ILC outcomes, as well as the work of James Crawford, in an academic capacity.

[28] See also ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law *(jus cogens)*' (2022) UN Doc A/77/10, annex; Cassese (n 14) 133–40.

[29] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) arts 1, 58, 76; African Charter on Human and Peoples' Rights (adopted and entered into force 26 June 1981) 1520 UNTS 217 (ACHPR) art 20; Arab Charter on Human Rights (adopted 23 May 2004, entered into force 15 March 2008) art 1. See also n 12.

[30] Relevant UNGA resolutions include: UNGA Res 217A (III) (1948) UN Doc A/RES/217A(III); UNGA Res 1188 (XII) (1957) UN Doc A/RES/1188(XII), 20; UNGA Res 1514 (XV) (1960) UN Doc A/RES/1514 (XV), 66; UNGA Res 2621 (1970) A/RES/2621(XXV), 1; UNGA Res 2625 (n 14); UNGA Res 1803 (XVII) (1962) A/RES/1803(XVII).

[31] UN Charter (n 29) arts 1, 55. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 88; *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 31, paras 52–53.

[32] League of Nations, 'Decision of the Council of the League of Nations on the Åland Islands including Sweden's Protest, Minutes of the Fourteenth Meeting of the Council' (1921) League of Nations Official Journal 697.

[33] League of Nations, 'Report Presented to the Council of the League of Nations by the Commission of Rapporteurs' (1921) LN Council Doc B7 21/68/106, 319.

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practice allows. This reflects the position of the ILC in their relevant Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law: '[w]here it appears that there may be a conflict between a peremptory norm of general international law (jus cogens) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.'[34] As such, the authors pursue what Neil MacCormick has called 'normative coherence': an interpretation evincing 'the common subservience of a set of laws to a relevant value or values',[35] with self-determination supplying the key value.[36] According to the position adopted in this article, self-determination sits normatively 'upstream' from the law governing State continuity and so informs its content, which the authors seek to establish through an assessment of contemporary practice alongside critical reflection upon its fundamental importance.[37]

2.1. Statehood as a vehicle for self-determination

Self-determination is the entitlement of peoples to exist as groups with a collective identity and protected interests in self-government.[38] Although this can be accomplished within existing States for some minorities,[39] the most complete means for securing self-determination is through independent statehood.[40] This holds because statehood grounds three *erga omnes* entitlements that maximise the capacity for collective self-determination,[41] together with the fullest possible degree of international representation. The first entitlement is to political independence, which can be understood in terms of freedom from 'inter-governmental domination'.[42] Such domination occurs where 'foreign control' is exercised in an 'overbearing [manner on the] decision-making of the entity concerned'.[43] As one of the authors has argued elsewhere, this is normatively salient because even though the absence of domination cannot render States just or legitimate,[44] it is necessary for their peoples to possess 'an

[34] ILC (n 28) para 43, conclusion 20.

[35] N MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 192.

[36] MacCormick's discussion of coherence was intended to apply to all legal norms; following the ILC, the analysis in this article is restricted to the relationship between peremptory norms and other norms of international law.

[37] This approach exemplifies the 'Grotian tradition' of international law, see H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1; P Capps, 'Lauterpacht's Method' (2012) 82 BYIL 248.

[38] Cassese (n 14) 72–73, 141–42.

[39] ibid 101–40; R Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)' in J Crawford (ed), *The Rights of Peoples* (OUP 1988) 17, 17–37; G Nettheim, '"Peoples" and "Populations": Indigenous Peoples and the Rights of Peoples' in Crawford, ibid 107–26. This dichotomy often perpetuates the colonial subordination of Indigenous peoples within settler and postcolonial States, see M Jackson, 'The Face behind the Law: The United Nations and the Rights of Indigenous Peoples' (2005) 8 YBNZJuris 10; K Senaratne, 'Beyond the Internal/External Dichotomy of the Principle of Self-Determination' (2013) 43 HKLJ 463.

[40] Crawford (n 14) 107.

[41] These bind the entire international community, see K Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' (2000) 4 MaxPlanckYrbkUNL.

[42] Green (n 14) 87 (emphasis in original).

[43] I Brownlie, *Principles of International Law* (OUP 2003) 76.

[44] Green (n 14) 234–35.

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institutional structure that is primarily concerned with governing *them*, as opposed to any other population'.[45] Peoples possessing such institutional structures gain crucial 'focuses' and 'forums' for their political action,[46] enabling their agency qua political collectives. Where statehood lapses in the absence of any alternative means for securing agency of this kind, these benefits are also lost. The preservation of statehood until it is voluntarily abandoned is therefore conducive to the political agency of peoples and, thereby, instrumental for their ongoing self-determination.[47]

The second relevant entitlement is the right to hold territory, whether maritime or land-based.[48] Non-State entities can possess territorial title; however, this is the exception, rather than the rule.[49] Once title is established, that territory is inviolable under international law.[50] Such inviolability, when combined with the right to political independence, renders States sovereign territorial entities.[51] Such sovereignty has significant value for self-determination. Instrumentally, the guaranteed physical space that territory provides facilitates the capacity to maintain and develop discrete linguistic and cultural traditions, as well as to secure basic subsistence and the pursuit of economic, social and cultural development.[52] As such, territorial sovereignty provides a 'privileged vehicle for the collective self-determination of peoples'[53] and, under customary international law, territorial integrity constitutes 'a corollary of the right to self-determination'.[54] Moreover, in the context of discussing non-self-governing territories, the ICJ observed that 'States have consistently emphasized that respect for … territorial integrity … is a key element of the exercise of the right to self-determination'.[55] Territory itself possesses intrinsic importance for two reasons. First, a people's use of its territory constitutes the most commonplace mode of political self-determination. To quote one of the present authors, writing elsewhere:

> the physical area [territory] demarcates becomes a space *within which politics can be performed.* Political marches and rallies require roads, squares, and parks, whilst smaller scale interactions also require physical venues … In addition, such things require the

[45] ibid 91.

[46] ibid 63–68.

[47] Agency, meaning some measure of control over decisions implicating one's interests, might be satisfied by 'internal' self-determination. However, no amount of agency in this sense guarantees the full measure of governmental autonomy that statehood affords.

[48] *Island of Palmas (Netherlands v United States of America)* (Award) (1928) 2 RIAA 829, 838.

[49] See, e.g. UNSC Res 1272 (1999) UN Doc S/RES/1272. According to the ICJ, the value of territorial integrity to non-self-governing territories must be understood within the context of their progression towards Statehood, free association or voluntary accession: see *Chagos Archipelago* (n 12) paras 155–157.

[50] UN Charter (n 29) art 2(4); UNGA 2625 (XXVI) (n 14); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, paras 191–193.

[51] Crawford (n 14) 32–33; Green (n 14) 200–02; V Lowe, *International Law* (OUP 2007) 138–39.

[52] Communication No 3585/2019 *Wunna Nyiyaparli Indigenous People v Australia* (10 July 2023) UN Doc CCPR/C/137/D/3585/2019, paras 2.2, 7.2.

[53] T Achiume, 'Migration as Decolonization' (2019) 71 StanLRev 1509, 1515; UNGA Res 1514 (n 30). See also *East Timor* (n 11) para 94 (holding that 'territorial integrity and unity' is fundamental to self-determination).

[54] *Chagos Archipelago* (n 12) para 160.

[55] ibid.

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> logistical, economic, and cultural support that territorial governance characteristically provides.[56]

Second, the very existence of a discrete territory—and the manner in which it is governed—creates an important 'focus' for politics, which enables a people to converge in agreement, disagreement and coordination, thereby creating 'something to talk *about* and act *in relation to*'.[57] These two points make territory immensely valuable for self-determination as a political process. To adopt the metaphor of the *Åland Islands* Commission of Rapporteurs (quoted in the chapeau of Section 2), if language and culture provide a people with its 'soul', then territory helps constitute the 'body' which that soul animates.

The third entitlement that statehood secures is permanent sovereignty over natural resources,[58] which enables peoples freely to dispose of the natural wealth within their respective territories for their own ends.[59] The historical case for reading resource sovereignty through the lens of self-determination is strong. Although constituted as a standalone principle,[60] permanent sovereignty was also conceived as a safeguard against postcolonial peoples being 'deprived of [their] own means of subsistence',[61] or from being otherwise exploited during decolonisation.[62] Moreover, as Moore argues, the domestic legal rules created by a 'self-determining people establish the terms of ownership [within their jurisdiction, such that] … [i]t is hard to see how a people could exercise important control over the collective conditions of their existence unless they have the capacity to make such rules'.[63] As such, since it implicates distributive and ecological justice, permanent sovereignty over natural resources falls within the core of

[56] Green (n 14) 75 (emphasis added).

[57] ibid 64 (emphasis in original).

[58] UNGA Res 1314 (XIII) (1958) UN Doc A/RES/1314(XIII); UNDRIP (n 16) art 8(b); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, para 244; *East Timor* (n 11) 111–13 (Dissenting Opinion of Judge Weeramantry); UNGA Res 1803 (n 30); UNGA Res 3201 (S-VI) (1974) UN Doc A/RES/3201(S-IV); UNGA Res 3281 (XXIX) (1974) UN Doc A/RES/3281 (XXIX); UNGA Res 41/128 (1997) UN Doc A/41/128; HRC (n 13) para 5 (highlighting 'the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to dispose of their natural wealth and resources without prejudice to any obligations').

[59] UNGA Res 1314 (n 58); UNGA Res 1803 (n 30) para 1 (attributing the right to peoples and States); ICCPR (n 13) art 47; ICESCR (n 13) art 25; ACHPR (n 29) art 21(1); *East Timor* (n 11) 153, 184 (Separate Opinion of Judge Weeramantry); N Schrijver, 'Self-Determination of Peoples and Sovereignty over Natural Wealth and Resources' in Office of the High Commissioner for Human Rights, *Realizing the Right to Development Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (UN 2013); E Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38 GeoWashInt'lLRev 33, 54; JN Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50 AJIL 854.

[60] *Armed Activities* (n 58) para 244.

[61] HRC (n 13) para 5.

[62] A Farmer, 'Towards a Meaningful Rebirth of Economic Self-determination: Human Rights Realization in Resource-Rich Countries' (2006) 39 NYUJInt'lLaw&Pol 417, 421; L Miranda, 'The Role of International Law in Intrastate Natural Resource Allocation' (2012) 45 VandJTransnat'lL 785, 796–98; E Enyew, 'Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments' (2017) 8 Arctic Review of Law and Politics 222, 222–23.

[63] M Moore, *A Political Theory of Territory* (OUP 2015) 175.

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self-determination conceived of as 'the freedom of choice of the political, social, economic and cultural system'.[64]

Turning from legal entitlements to the degree of international representation that statehood affords, although non-State entities can possess legal personality,[65] statehood is necessary for membership within several international organisations, including the UN,[66] and only States can bring contentious cases before the ICJ.[67] The importance of such standing can be demonstrated by the position of non-State entities like the Republic of China (Taiwan), which maintains informal relations and a number of bilateral treaty arrangements. Although Taiwan is a non-State member of some international organisations, such as the World Trade Organization (as an independent customs territory) and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) (as a Fishing Entity),[68] this limitation to informal relations and ad hoc legal statuses severely limits its international standing. Taiwan's membership in the CCSBT is a case in point: between the adoption of the Convention for the Conservation of Southern Bluefin Tuna in 1993 and the CCSBT's adoption of the Resolution to Establish an Extended Commission and an Extended Scientific Committee (Extended Commission) in 2001,[69] Taiwanese representatives were limited to observer status within the CCSBT and had to push for voting rights within the Extended Commission.[70] As this indicates, although self-determination can find expression other than through statehood, the peoples of independent States are uniquely privileged when it comes to the enjoyment and protection of that right.

2.2. Self-determination and sea-level rise

Next, this article canvasses the impact of sea-level rise upon self-determination to underscore two points. First, that sea-level rise is already undermining the enjoyment of self-determination by affected peoples globally, but particularly in SIDS. Second, that any involuntary losses of statehood would further and wrongfully undermine the enjoyment of that right. In the Pacific Islands, as well as other regions like the Arctic and coastal areas of South Asia and Africa, associated losses and damages are cumulatively undermining the cultural, economic and political self-determination of affected peoples in several ways. This is illustrated through a brief survey of climate change impacts in the Pacific.

[64] *Nicaragua* (n 50) para 263.

[65] *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178–79.

[66] UN Charter (n 29) art 4(1); *Admission of a State to the United Nations (Charter, Art 4)* (Advisory Opinion) [1948] ICJ Rep 57, 62; R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 11–57.

[67] Statute of the International Court of Justice (adopted 18 April 1946) 33 UNTS 993, art 34(1).

[68] Although not the UN, from which it was displaced by the Peoples' Republic of China in 1971, see UNGA Res 2758 (XXVI) (1971) UN Doc A/RES/2758(XXVI).

[69] Commission for the Conservation of Southern Bluefin Tuna, 'Reports of the Meetings for the Seventh and Eighth Year of the Commission (including Financial Statements)' (2002) 54.

[70] A Serdy, 'Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity' (2005) 75 BYIL 183, 186–91.

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First, damage to coral reefs and fish populations has disrupted subsistence fishing and traditional food systems that are central to Pacific Islander identities.[71] The consequent reliance on imported, processed foods poses risks to health, wellbeing and cultural continuity.[72] Second, coastal erosion and inundation has forced relocation of coastal settlements in numerous Pacific Islands, severing communities from ancestral lands. Relocation severs ties to burial grounds and other sites of cultural significance.[73] Third, extreme weather events caused or amplified by climate change have damaged homes and infrastructure and disrupted essential services.[74] The resulting economic and political disruption undermines self-sufficiency and compounds reliance on external aid.[75] Fourth, the salinisation of soil and groundwater limits agricultural productivity in multiple SIDS, threatening food security.[76] Again, this compounds reliance on food imports, with implications for health and economic self-determination. Fifth, ocean warming and acidification have contributed to the bleaching and dying of large swathes of coral reef in the Pacific region in recent years.[77] This constitutes irreversible cultural loss, given the fundamental importance of coral ecosystems for Pacific Islander worldviews, identities and the transmission of traditional knowledge.[78]

In light of the cultural, economic and political centrality of ancestral lands and seas to self-determination, these consequences fundamentally disrupt the ability of affected peoples to culturally self-determine.[79] The losses of land, resources, infrastructure and social cohesion engendered by sea-level rise and other climate impacts severely constrain capacity for cultural and economic self-determination. The associated loss of governance systems and the ability to self-manage resources and land further diminishes political self-determination.[80] Forced displacement of any kind also seriously disrupts social, economic and cultural self-determination by restricting the choices that peoples are empowered to make.[81] Where such relocation must be undertaken, the loss cannot be compensated through monetary reparations.[82]

[71] C Storlazzi et al, 'Most Atolls Will Be Uninhabitable by the Mid-21st Century because of Sea-Level Rise Exacerbating Wave-Driven Flooding' (2018) 4 Science Advances 1; Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2022: Mitigation of Climate Change' (Sixth Assessment Report, Working Group II, 2022) 2095, 2099.

[72] R Schiffman, 'As Seas Rise, Tropical Pacific Islands Face a Perfect Storm' (*Yale Environment 360*, 6 July 2017) <https://e360.yale.edu/features/as-seas-rise-tropical-pacific-islands-face-a-perfect-storm>; IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP 2019) 326–28.

[73] ibid.

[74] IPCC, 'Summary for Policymakers' in 'Climate Change 2021: The Physical Science Basis' (Sixth Assessment Report, Working Group I, 2021) 71.

[75] AS Bordner, 'Climate Migration & Self-Determination' (2019) 51 ColumHumRtsLRev 183, 225–26; *Chagos Archipelago* (n 11) para 167; *Western Sahara* (n 13) para 51; UNGA Res 1514 (n 30).

[76] ibid.

[77] Storlazzi et al (n 71); IPCC (n 71).

[78] J Barnett and J Campbell, *Climate Change and Small Island States* (Routledge 2010) 1.

[79] L Yamamoto and M Esteban, *Atoll Island States and Climate Change: Sovereignty Implications* (UN University Institute of Advanced Studies, 2011) 41.

[80] KP Whyte, 'Indigenous Peoples, Climate Change Loss and Damage, and the Responsibilities of States' in M Doelle and S Seck, *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar 2021).

[81] See sources cited in (n 75).

[82] M Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2 Climate Law 345, 367.

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Impacts on ancestral lands and seas may even deprive affected peoples of subsistence altogether. It is therefore clear that existing impacts of anthropogenic climate change, including sea-level rise, already seriously undermine self-determination.

Involuntary loss of statehood would compound these harms in a number of ways. Not only would peoples deprived of statehood lose the entitlements and standing noted above, they would also risk losing access to key support structures currently accessible only to States, such as the Global Environment Facility, a multilateral fund that provides financial assistance to developing States to address environmental issues.[83] Moreover, under Decision 2/CP.27 and 1/CMA.4 on Funding Arrangements for Responding to Loss and Damage associated with the Adverse Effects of Climate Change, including a Focus on Addressing Loss and Damage (CMA.4),[84] adopted during the twenty-seventh Conference of the Parties to the UN Framework Convention on Climate Change (commonly known as COP27), only 'developing countries' are cited as meriting climate change-related compensation.[85] CMA.4 does not mention 'peoples' at all, while the associated Decision 1/CP.27 on the Sharm el-Sheikh Implementation Plan uses the phrase only twice, and only vis-à-vis State responsibility towards Indigenous peoples.[86] Although 'country' and 'State' are not sociologically equivalent,[87] under international law they are usually cognate.[88] By virtue of their statehood, SIDS are currently entitled to claim reparations as the harms of sea-level rise accrue. However, given the importance of climate reparations *remaining* available to affected peoples, the importance of SIDS maintaining widespread recognition as States in this context is clear, at least until sufficient reparations have been provided or alternative routes to recovery are established.

This position must be contrasted with the possibility of statehood being consensually dissolved. Voluntary dissolution following sea-level rise would almost certainly entail either the accession of the affected State to another, or a merger on equal terms to create a new entity. Far from abrogating self-determination, such accessions or mergers represent means through which new and valuable cultural, economic, political and social traditions develop. This was the case, for example, with the unification of Berlin under quadripartite administration, the German Democratic Republic (GDR) and the Federal Republic of Germany (FRG).[89] Indeed, since the process leading to the GDR's

[83] General Environment Facility, *How Projects Work* <https://www.thegef.org/projects-operations/how-projects-work>.

[84] Conference of the Parties to the Paris Agreement (CoP), 'Decision 2/CP.27 and 1/CMA.4 of 20 November 2022 on Funding Arrangements for Responding to Loss and Damage associated with the Adverse Effects of Climate Change, including a Focus on Addressing Loss and Damage'.

[85] ibid paras 1, 2.

[86] CoP, 'Decision 1/CP.27 of 18 November 2022 on Sharm el-Sheikh Implementation Plan', preamble, para 51.

[87] D Miller, *On Nationality* (OUP 1995) 84–85; M Weber, 'Politics as a Vocation' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1991) 77, 84–86.

[88] Historically, there was slippage between nationhood and statehood: see C Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton UP 1961) 87–101. However, insofar as 'countries' are referenced in international legal texts at all, the term is almost always used in lieu of statehood, which is the technical legal category: see Crawford (n 14) 31.

[89] We assume that at least the GDR and FRG were separate States at some stage prior to 1990: see *International Registration of Trade Mark (Germany) Case* (1959) 28 ILR 82; F Mann, *Studies in International*

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merger with the FRG was marked by peaceful political action, inter-State negotiations and representative elections,[90] it is perhaps one of the clearest historical instances of self-determination being exercised during State dissolution. Were affected SIDS to undertake something similar, with an appropriately participatory political process,[91] there could be no objection from the perspective of self-determination. This can only hold, however, where the decision to dissolve is made by SIDS themselves.

3. 'Statehood as effectiveness' and self-determination

Involuntary dissolution would severely undermine self-determination within States affected by sea-level rise. As noted in Section 1, it is sometimes contended that loss of effectiveness presents the greatest risk of this harm materialising.[92] As such, the present argument begins by examining to what extent this claim is made out. At its most basic,[93] the principle of effectiveness within the law of statehood posits that: '[i]n order to say that a State exists … it is enough that [its] territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.'[94] This formulation was endorsed by the Badinter Arbitration Commission—established in the context of the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY)—which held that 'the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority'.[95] The most famous legal criteria along these lines are found in Article 1 of the Montevideo Convention on the Rights and Duties of States (Montevideo Convention): '[t]he state as a person of international law

Law (Clarendon Press 1973) 549–50, 675–79; Q Wright, 'Some Legal Aspects of the Berlin Crisis' (1961) 55 AJIL 959, 960. The legal status of Berlin was less clear at the relevant time: see ID Henry and MC Wood, *The Legal Status of Berlin* (Grotius Publishing 1987); Crawford (n 14) 459–66.

[90] This 'Peaceful Revolution' crippled the Socialist Unity Party. On 1 December 1989, the GDR Parliament struck their right to rule from the constitution, leading to their disbandment on 18 December 1989. The political manoeuvres and protests both preceding and following this were non-violent: see K Timmer, *Vom Aufbruch zum Umbruch: Die Bürgerbewegung in der DDR 1989* (Vandenhoeck & Ruprecht 2000) 276–79; VN Klinger, 'Bühne der Freiheit' (*Der Tagesspiegel*, 4 November 2009) <https://web.archive.org/web/20091108171522/http://www.tagesspiegel.de/zeitung/Die-Dritte-Seite-Mauerfall-4-November-Deutsches-Theater%3Bart705%2C2940530>; R Dalton (ed), *The New Germany Votes: Unification and the Creation of the New Party System* (Berg Publishing 1993).

[91] UNGA Res 1514 (XV) (n 30); UNGA Res 2625 (XXV) (n 14); *Western Sahara* (n 10) paras 55–59. The clearest means would be via popular referendum. For analysis of analogous past practice, see J Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Bloomsbury 2013) 169–99.

[92] A Green, '*The Creation of States* as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship' (2022) 10 AustYBIL 67, 81–83. For endorsements, see Marek (n 1) 7; ILC, 'Report of the International Law Commission on the Work of Its Seventy-Third Session' (12 August 2022) UN Doc A/77/10, 332–41; ILC, 'Sea-Level Rise in Relation to International Law: Second Issues Paper' (19 April 2022) UN Doc A/CN.4/752, 48–56; Crawford (n 14) 48, 671; L Oppenheim, *International Law* (8th edn, D McKay 1955) vol 1, 451.

[93] We take this preliminary discussion largely from Green (n 2) 204–08.

[94] *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 9 Recueil TAM 336, 344.

[95] *Opinion No 1* (1991) 92 ILR 162, 164–65. See also R Nicholson, *Statehood and the State-Like in International Law* (OUP 2019) 94–101; Camprubí (n 3) 18–30.

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should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.'[96]

Article 1 is questionably accurate vis-à-vis customary international law, especially in prescribing that territory must be 'defined', as opposed to roughly delimited,[97] and that 'the capacity to enter into relations with other states' is a criterion for statehood rather than a consequence thereof.[98] More detailed treatment of effectiveness was given by the *Åland Islands* Commission of Jurists, which found that:

> In the midst of revolution and anarchy, certain elements essential to the existence of a State … [are] lacking … Political and social life [is] disorganized; the authorities [are] not strong enough to assert themselves; civil war [is] rife … [State creation in circumstances of secession cannot be established] until a stable political organization had been created, and until the public authorities … become strong enough to assert themselves throughout the territories of the [new] State without the assistance of foreign troops … [only then is it] possible to re-establish order and normal political and social life, little by little.[99]

The factual *sine qua non* of effectiveness is therefore 'some degree of maintenance of law and order and the establishment of basic institutions' in relation to a given territory.[100] This mirrors Article 1 of the Resolution Concerning the Recognition of New States and New Governments, adopted by the Institut de Droit International in April 1936, which stresses 'the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law'.[101] Similar language was also used in Article 3(ii) of the Draft Articles on the Law of Treaties, presented in 1956 to the ILC, which conceptualised statehood as 'consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State'.[102]

Some States have recently contended that effectiveness is irrelevant to whether or not statehood endures.[103] In the view of the authors, this is mistaken: States cannot exist entirely as legal abstractions.[104] To claim otherwise would invite a *reductio ad absurdum* whereby States might exist, for example, without any people (diasporic or otherwise) to which they correspond. This contradicts the idea that the entitlements attached to legal statehood sit downstream from self-determination, the normative case for which was

[96] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

[97] Crawford (n 14) 48–51.

[98] ibid 61.

[99] *Åland Islands Case* (1920) League of Nations Official Journal Spec Supp 4, 8–9.

[100] Crawford (n 14) 59.

[101] Institut de Droit International, 'Resolutions Concerning the Recognition of New States and New Governments' (1936) 30 AJIL 185.

[102] ILC, 'Draft Articles on the Law of Treaties', UNYBILC, Vol II, Part II (1949) 287.

[103] Antigua and Barbuda, 'Response to the International Law Commission Second Issues Paper on Sea-Level Rise and the Effect on Statehood and Protection of Persons' (30 June 2023) UN Doc A/CN.4/752, paras 2–3; C Giorgetti, *A Principled Approach to State Failure* (Martinus Nijhoff 2010) 65–66.

[104] See Philip Jessup on behalf of the United States: 'one cannot contemplate a State as a kind of disembodied spirit': UNSC, Official Records No 128 (2 December 1948) UN Doc S/PV.383, 11. See also *Obligations of States in Respect of Climate Change* (n 9) (Declaration of Judge Tomka) para 3.

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advanced in Section 2.1. The more persuasive view is that effectiveness conditions State continuity but that its requirements are sufficiently capacious to admit a wide range of circumstances. In this section, the authors defend this proposition in relation to sea-level rise by articulating an account of effectiveness that turns in substantial part on the value of self-determination.

3.1. The threshold for effectiveness: some preliminary points

Although the foregoing discussion outlines the nature of effectiveness, it leaves untouched where the threshold is set for present purposes. Ultimately, this must be established in concert with articulating the presumption of State continuity, since the latter acts as a constraint upon the operation of the former (see Section 4). It is nonetheless useful to consider effectiveness in isolation since, if it can accommodate States with wholly submerged or uninhabitable land, or with wholly diasporic governments or populations, it will be unnecessary to argue for an effectiveness exception for States affected by sea-level rise. The authors contend that such an understanding of effectiveness is possible, although it remains to be seen whether the international community will accept an interpretation along these lines.

It is sometimes claimed, contra effectiveness as articulated above, that statehood (or, at least, international legal personality) can endure without territory of any sort, typically citing precedents such as the Sovereign Order of Malta or the Vatican City between 20 September 1870 and 11 February 1929.[105] This article shall not pursue that suggestion. SIDS already possess extensive territories and may well continue to do so notwithstanding any eventual submergence or uninhabitability. As one of the present authors has argued, 'maritime territory has long been recognised under international law' and such territory '*could* be delineated without reference to land'.[106] Notwithstanding its novel nature vis-à-vis the law of sea, this point is supported by a growing body of State practice and opinio juris, as recently expressed in two key Declarations, the 2023 PIF Declaration and the 2024 AOSIS Declaration, which are discussed in detail in Section 4.2. Both Declarations build on the 2021 PIF Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, which states that:

> maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the [UN] Convention [on the Law of the Sea], and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.[107]

Over 100 States currently subscribe to this view on the basis that maritime baselines, from which the existence and extent of such zones are calculated,[108] must be considered 'fixed' rather than 'ambulatory'.[109] The notion that a defined territory might persist in

[105] ILC, 'Sea-Level Rise in Relation to International Law: Second Issues Paper' (n 92) paras 113–137.

[106] Green (n 2) 213; see also Camprubí (n 3) 100–14 (emphasis in original).

[107] Pacific Islands Forum (PIF), 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise' (6 August 2021).

[108] R Churchill, V Lowe and A Sander, *The Law of the Sea* (Manchester UP 2022) 45–51.

[109] ibid 54–60; R Rayfuse, 'Sea Level Rise and Maritime Zones' in M Gerrard and G Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2013) 167, 183–85. See also *Obligations of States in Respect of Climate Change* (n 9) paras 359–362.

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relation to such baselines, notwithstanding the absence of inhabitable or unsubmerged land, was recently endorsed within the ILC, in which it was observed that 'sovereignty refer[s] to the whole territory under the State's control and not solely to the land territory. Thus, a territory that became fully submerged because of sea-level rise should not be considered a non-existent territory'.[110] This position aligns with that of Pacific Island States, who have embraced a pan-oceanic identity of being 'large, connected and strategically important'.[111] As Samoan Prime Minister Tuilaepa Sailele Malielegaoi explained:

> The Pacific Ocean has provided our island communities their cultural and historical identity since time immemorial … Throughout the region, customary association with the sea forms the basis of present-day social structures, livelihoods and tenure systems and traditional systems of stewardship governing its use. Pacific leaders urge the world to recognise the inseparable link between our ocean, seas and Pacific island peoples: their values, traditional practices and spiritual connection.[112]

As such, although 'non-territorial States' might be theoretically intriguing, their practical importance is far less pressing vis-à-vis effectiveness than the notion of submerged or otherwise uninhabitable States, or States with wholly diasporic populations and governments.

In terms of international practice on this point, a guiding observation must be that the general threshold of effectiveness for State continuity cannot be particularly high. Unless this is acknowledged, it becomes practically impossible to explain the continued existence of the Democratic Republic of the Congo,[113] the Federal Republic of Somalia,[114] the Central African Republic,[115] the Republic of South Sudan[116] and, increasingly, the State of Libya,[117] the Syrian Arab Republic[118] and the Republic of

[110] ILC, 'Report of the Study Group on Sea-Level Rise in Relation to International Law' (15 July 2022) UN Doc A/CN.4/L.972, 196; cf *Obligations of States in Respect of Climate Change* (n 9) (Declaration of Judge Tomka) para 8.

[111] M Taylor, 'Griffith Asia Lecture 2019' (Griffith University, Brisbane, Australia, 11 November 2019).

[112] TS Malielegaoi, 'Our Values and Identity as Stewards of the World's Largest Oceanic Continent: The Blue Pacific: Remarks by Samoan Prime Minister Tuilaepa Lupesoliai Sailele Malielegaoi' (PIF Secretariat, Suva, 2017).

[113] EF Kisangani, *The Context of Congo's Internal Wars, 1960–2010* (Lynne Rienner Publishers 2012); Crawford (n 11) 55–56.

[114] M Yuusuf, *The Genesis of the Civil War in Somalia: The Impact of Foreign Military Intervention on the Conflict* (IB Tauris 2021) particularly chs 2, 4 and 5; J Fergussson, *The World's Most Dangerous Place: Inside the Outlaw State of Somalia* (Black Swan 2014) 25–56, 98–120.

[115] S Smith, 'CAR's History: The Past of a Tense Present' in T Carayannis and L Lombard (eds), *Making Sense of the Central African Republic* (Zed Books 2015) 17; L Lombard, 'The Autonomous Zone Conundrum: Armed Conservation and Rebellion in North-Eastern CAR' in T Carayannis and L Lombard, ibid 142; G Vlavonou, *Belonging, Identity, and Conflict in the Central African Republic* (Wisconsen UP 2023) chs 1 and 2.

[116] J Young, *South Sudan's Civil War: Violence, Insurgency and Failed Peacemaking* (Zed Books 2019) 64–166; C Pinaud, *War and Genocide in South Sudan* (Cornell UP 2021); H Johnson, *South Sudan: The Untold Story from Independence to Civil War* (IB Tauris 2016).

[117] W Lacher, *Libya's Fragmentation: Structure and Process in Violent Conflict* (IB Tauris 2020) 19–58; J Oakes, *War Lord: Khalifa Haftar and the Future of Libya* (Amberley Publishing 2021).

[118] C Phillips, *The Battle for Syria: International Rivalry in the New Middle East* (Yale UP 2020); N Van Dam, *Destroying a Nation: The Civil War in Syria* (IB Tauris 2017) chs 3, 5; A Baczko, G Dorronsoro and A Quesnay (eds), *Civil War in Syria: Mobilization and Competing Social Orders* (CUP 2018) pts III and IV.

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Yemen.[119] The probity of these examples cannot be blunted by the contrary observation that most remaining States possess far higher levels of effectiveness, since it is always marginal or 'hard' cases that allow legal thresholds to be precisely ascertained.[120] As such, the relative stability of most States is better viewed as widespread supererogation of a relatively low threshold. Each of these examples either exhibited, or continues to exhibit, long-standing endemic violence and lack of governmental control, together with both internal and international population displacement. Nonetheless, each State continues to possess both a roughly delimited territory (however disputed or contested) and a population that can be defined in relation to their nationality, if not their residence.

The point is not that these cases offer direct factual analogies to SIDS affected by sea-level rise. In each, the apparent disruptions to effectiveness are, or were, social and political, rather than environmental. Nonetheless, since practice creates no order of lexical priority amongst the factual elements of effectiveness, there is no a priori reason to suppose that SIDS without inhabitable land—but in possession of clearly defined maritime territories, governments with largely undisputed domestic legitimacy and diasporic populations of identifiable nationals—should fare worse vis-à-vis effectiveness than States facing potentially indefinite civil war or foreign occupation.[121]

Supporting this interpretation are two leading opinions. The first is *Legal Status of Eastern Greenland*, from which can be drawn two important points. One is that, when identifying the initial extent of Danish title, the Permanent Court of International Justice (PCIJ) placed particular emphasis upon 'the Arctic and inaccessible character of the uncolonized parts of the country'.[122] The inhospitable nature of the Arctic desert led the PCIJ to insist upon a far lower threshold for demonstrating governmental control than it would otherwise have done.[123] Notwithstanding that *Eastern Greenland* was concerned with the governance of land, its insistence upon the liberalising influence of geographical inhospitability on effectiveness should hold no less in relation to oceans, at least insofar as SIDS maintain some level of factual control over their maritime territory. Second, the PCIJ also established that, if title is uncontested by another State, the standard for evincing regulatory authority will also be lower.[124] This should also hold for submerged or uninhabitable SIDS, since the alternative to their maintaining wholly maritime territories would be such areas becoming part of the high seas, rather than falling subject to contrary title claims.

Another relevant Advisory Opinion is that of the ICJ on *Western Sahara*, which sets an important precedent regarding peoples with what, from a Westphalian perspective, might be considered 'atypical' relationships with land. In that case, the ICJ held that the nomadic peoples within Rio de Oro and Sakiet El Hamra occupied their lands,

[119] H Lackner, *Yemen in Crisis: Devastating Conflict, Fragile Hope* (Saqi Books 2023) 48–84, 119–48, 203–28, 333–68; G Hill, *Yemen Endures: Civil War, Saudi Adventurism and the Future of Arabia* (Hurst & Company 2017) 203–94; B Kaussler and K Grant, *Proxy War in Yemen* (Routledge 2023) 5–22, 37–74.

[120] R Dworkin, *Law's Empire* (Bloomsbury 1986) 110.

[121] McAdam (n 3) 136–38.

[122] *Legal Status of Eastern Greenland (Denmark v Norway)* (Merits) PCIJ Ser A/B No 53, 50–51.

[123] ibid.

[124] ibid 46.

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notwithstanding their itinerant nature.[125] Once again, there are two points to draw from this. First, by holding that 'State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*',[126] the ICJ explicitly endorsed a conception of effectiveness capacious enough to encompass 'peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them'.[127] Second, echoing the point made in *Eastern Greenland*, the ICJ emphasised the 'very special characteristics which, at the time of colonization by Spain, largely determined the way of life and social and political organization of the[se] peoples'.[128] In the view of the authors, two arguments follow from this. First, since nomadic peoples can maintain territorial title,[129] there is no a priori reason to suppose that such title could not also be maintained by SIDS actively governing territories lacking land fit for human habitation. If nomadic routes and the use of sacred sites are sufficient to establish effectiveness,[130] oceanic governance in relation to an area of culturally and politically important submerged land would seem equally so. Second, *Western Sahara* demonstrates that effectiveness can be maintained notwithstanding the non-settled status of the relevant population. True, there is argumentative space between itinerant and diasporic populations and, intuitively, it might be objected that both cases are still fundamentally concerned with more-or-less inhabitable *land*. Nonetheless, although this might prevent either case from being considered direct authority, these objections do little to undermine the fundamental point that effectiveness is evidently a flexible concept.

One example of this flexibility is provided by the implications for the law of State continuity generated by the established practice of recognising governments in exile. It is sometimes asserted that recognition of such exceptions to ordinary governmental function, being both geopolitical and characteristically temporary in nature, provide unhelpful analogies to the physical and potentially permanent consequences of sea-level rise.[131] However, this obscures the hermeneutic value of exiled governments, which lies not in their provision of direct analogies but, rather, in their incidental demonstration that effectiveness does not require the constitutive elements of statehood (in this case, territory and government) to be geospatially concurrent.[132] Like populations and governments potentially displaced by sea-level rise, governments in exile are necessarily diasporic. This indicates that international law already accepts that effectiveness is not fundamentally undermined where governments operate (on a potentially indefinite basis) wholly removed from their territories and populations.

[125] *Western Sahara* (n 13) para 81.
[126] ibid para 80.
[127] ibid para 81.
[128] ibid para 87.
[129] R Nicholson, 'Was the Colonisation of Australia an Invasion of Sovereign Territory?' (2019) 20 MJIL 493, 510–18.
[130] *Western Sahara* (n 13) para 87.
[131] ILC, 'Report of the International Law Commission on the Work of Its Seventy-Third Session' (n 92) paras 207, 213.
[132] Camprubí (n 3) 219–29.

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Consider the People's Democratic Republic of Algeria, for which a pre-decolonisation Provisional Government was established in Cairo on 19 September 1958.[133] By the time of Algeria's independence referendum on 1 July 1962, and notwithstanding threats by the French Republic,[134] 31 States had formally recognised the Provisional Government as the legitimate representatives of Algeria.[135] Indeed, the role of the Provisional Government within international relations was cited by some as evidence of Algeria's independence, notwithstanding French opposition.[136] To take another example, the government of the Kingdom of Belgium remained operational within the French municipality of Sainte-Adresse between 1914 and 1918, notwithstanding its exile.[137] Furthermore, the alleged creation of Slovakia under German occupation in 1939 did not extinguish the Kingdom of Yugoslavia, which maintained a government in exile until the creation of the SFRY in 1945.[138] Many more cases have existed where large sections of the international community offered ongoing recognition to exiled governments, including the Kingdom of Cambodia,[139] the State of Kuwait[140] and the Republic of Haiti.[141] In all such cases, statehood endured, notwithstanding the total alienation of an internationally recognised government from its territory and people. Moreover, in cases such as the Republic of Poland,[142] the Netherlands[143] and Belgium between 1940 and 1944,[144] governmental exile coincided with significant population displacement, which also raised few objections to State continuity. As noted, these examples suggest not only tolerance for significant disruptions of governmental control but also for geospatial fragmentation of the constitutive elements of effectiveness. One might reasonably ask, if governments can persist in exile without disrupting State continuity, why not populations also? Indeed, assuming an attractive normative case for interpreting effectiveness in this permissive manner, the onus should arguably be upon those opposed to this view to contend otherwise.

[133] S Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 2001) 300.

[134] CH Favrod, *Le FLN et l'Algérie* (Plon 1962) 166.

[135] Talmon (n 133) 15, 120–21, 300–01.

[136] ibid 15; 'Report of the Minister for North African Affairs in the GPRA' (1960) 95 Les archives de la révolution algérienne 447, 455.

[137] Talmon (n 133) 262, 286. See also the recognition of that government within the French cases of *Charron v Evans et gouvernement belge* (1915–16) 11–12 Revue de droit international privé 208, 214; *Ministère public v D* (1915) 11 Revue de droit international privé 215, 215.

[138] W Roberts, *Tito, Mihailović, and the Allies, 1941–1945* (Duke UP 1987) 312–13.

[139] Talmon (n 133) 306–07; see also ibid 121–23, 309–10.

[140] ibid 314–15.

[141] ibid 315.

[142] ibid 291; E Stańczyk, 'Exilic Childhood in Very Foreign Lands: Memoirs of Polish Refugees in World War II' (2018) 11 Journal of War and Culture Studies 136, 137–41.

[143] Talmon (n 133) 292; R Grüter and A van Mourik, 'Dutch Repatriation from the Former Third Reich and the Soviet Union: Political and Organizational Encounters and the Role of the Netherlands Red Cross' (2020) 45 Historische Sozialforschung 151, 152–53.

[144] Talmon (n 133) 262–63, 292–93; H van der Wee and M Verbreyt, *A Small Nation in the Turmoil of the Second World War: Money, Finance and Occupation (Belgium, Its Enemies, Its Friends, 1939–1945)* (Leuven UP 2009) 44.

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3.2. Towards 'effectiveness as self-determination'?

It is to that normative case this article now turns. In articulating it, the authors draw upon a contention that one of them has argued for elsewhere: that effectiveness might be interpreted 'primarily in terms of … [what] renders states "effective catalysts for political action"'.[145] On this account, States are not effective simply because they maintain factual control of territory but, rather, because and to the extent that their doing so enables 'private individuals [to] undertake ethically valuable political action'.[146] To this end, that author argues:

> When considering effectiveness and sea-level rise from the perspective of political community, one important question is the extent to which the governance of an autonomous maritime territory could be responsive to the political action and ethos of a diasporic population. If the politics of such populations can maintain strong links with physically removed territorial units, the case for continued effectiveness will be firm, notwithstanding any lack of permanent residence.[147]

Although that argument focused primarily upon political self-determination, its overall approach might fruitfully be broadened to encompass all of self-determination's constitutive elements, including the cultural, the economic and the social.

There is no reason to suppose that politically independent peoples lack all capacity to self-determine in relation to territories from which they are physically removed,[148] nor that maritime territory provides a wholly inapt focus for such activity. The point is not whether inhabitable land to which a population has permanent access is superior vis-à-vis self-determination (it is) but whether wholly maritime territory or uninhabitable land would be *sufficient* in some relevant sense.[149] There is reason to suppose so: to once again quote one of the present authors, '[m]any SIDS already identify as "large ocean states", and have established histories of progressive politics in relation to those oceans'.[150] Administering maritime territory remotely might be done in any number of ways and, as is the case with maintaining some degree of law and order on land, international law sets no requirements for how this should be accomplished. Naturally, there will be considerable economic and logistical challenges involved, for which most SIDS will need support from other States. Such support, however, is by no means inconsistent with independent statehood,[151] nor would receiving it prevent SIDS from playing an important ongoing role in the self-determination of their people(s).

As to the spaces within which self-determination of diasporic peoples might take place, some SIDS are already establishing such means for ensuring cultural and political

[145] Green (n 2) 225.

[146] ibid 223.

[147] ibid 226; cf *Obligations of States in Respect of Climate Change* (n 9) (Declaration of Judge Tomka) para 8.

[148] ibid.

[149] Borrowing from the Administrative Court of Cologne Judgment of 3 May 1978 in *Case No 9 K 2565/77* (1978) Deutsches Verwaltungsblatt 510, 511, we might conceptualise this in terms of whether such territory could sustain 'communal life' (*Gemeinschaftsleben*) or a 'community of fate' (*Schicksalsgemeinschaft*).

[150] Green (n 2) 227 (citations omitted).

[151] A Green and D Guilfoyle, 'The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change' (2024) 118 AJIL 684, 698–702.

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resilience. One example is Tuvalu, which, in 2022, announced its aim to create a digital platform within which the self-determination of its people can flourish.[152] 'Our digital nation', according to then Prime Minister Natano, 'will provide an online presence that can replace our physical presence and allow us to continue to function as a state'.[153] Moreover, since any host State would (ex hypothesi) have a duty not to undermine the self-determination of diasporic peoples residing within their own territory, there is no a priori reason to suppose that this would significantly restrict such diasporic self-determination either.

Any conception of effectiveness that made space for diasporic governance would certainly be novel as regards established international practice; however, it would very much go with the grain of self-determination as examined in Section 2. As noted in Section 1, it remains to be seen whether the international community might accept a conception along these lines. Nonetheless, its provisional plausibility presents a promising starting point and helps to exemplify the argumentative scope that becomes possible once self-determination is adopted as a hermeneutic lens within the law of State continuity. Moreover, given that it was recently raised in the ILC that speculative and future-oriented conceptions of effectiveness may well be required in response to the challenges posed by sea-level rise,[154] framing a conception explicitly in terms of 'effectiveness as self-determination' strikes the present authors as a constructive way to begin.

4. The presumption of State continuity

At the 2018 International Law Association Conference, 'it was generally agreed that … as a starting point, there should be a presumption of continuing statehood in cases where land territory was lost'.[155] This corresponds to the accepted position that customary international law establishes a 'strong presumption of state continuity, which entails that even prolonged periods of ineffectiveness will not result in statehood lapsing'.[156] That presumption explains why even extended failures of government, and considerable losses of both territory and population, have been treated as consistent with State continuity.[157] The application of this presumption to sea-level rise is complex since, to date, the continuity of States has been at issue only in response to seemingly temporary political causes, such as unlawful annexation or belligerent occupation. By contrast, sea-level rise is fundamentally physical, even though anthropogenic, and therefore presents an unprecedented threat to statehood with potentially permanent implications.

In this section, the argument contends that the presumption of continuing Statehood not only exists to secure international stability by preventing States from 'blipping in

[152] N Jonas, 'As Tuvalu Succumbs to Rising Sea Levels, the Island Nation Wants to Be the First Virtue Country' (*Salon*, 3 December 2022) <www.salon.com/2022/12/03/as-tuvalu-succumbs-to-rising-sea-levels-the-island-nation-wants-to-be-the-first-virtual-country/>.

[153] ibid.

[154] ILC (n 9) 28.

[155] International Law Association (ILA), 'International Law and Sea Level Rise: Report' (ILA Conference, Sydney, 2018) 25.

[156] Green (n 2) 206.

[157] Marek (n 1) 15–24.

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and out of existence',[158] but also to promote the ongoing self-determination of peoples already in possession of statehood. It is argued, as a result, that the presumption should be interpreted to support State continuity in circumstances of sea-level rise unless and until the affected people(s) clearly express a desire for their extant political organisation to alter. To that end, this argument has two stages. First, it advances a normative case for interpreting the presumption of continuity in this way (Section 4.1). Second, it examines the support that such an interpretation finds within contemporary practice, with particular emphasis upon regional custom and the practice of specially affected States (Section 4.2).

4.1. The normative case

The entitlements ordinarily contingent upon statehood, including political independence, territorial sovereignty and permanent sovereignty over natural resources, are instrumental for the maximal enjoyment of self-determination. This normative profile helps to explain why, once statehood is established, there should be a strong presumption in favour of its continuity. This is particularly important vis-à-vis postcolonial States, since their self-determination did not cease at the moment of independence but continues as a legally protected process.[159] Several SIDS, including Tuvalu, the Republic of Vanuatu and the Republic of Kiribati, have expressed the desire of their peoples to continue living on their ancestral islands, drawing upon national decolonisation discourses established during the 1960s.[160] These same States have repeatedly raised concerns about the dangers of global warming at regional and international meetings held over a span of several decades.[161] Seen in this context, contemporary concerns about the disruption of self-determination by sea-level rise cannot be separated from recent histories of decolonisation. Indeed, the significant delays in decolonisation experienced by SIDS exacerbate the injustice that any unjustified rejection of State continuity would occasion.[162] As postcolonial communities that went an unusually long time without formal independence, the peoples of these States have what might be considered an 'equitable deficit' in relation to their self-determination.[163] To foreclose on their legal continuity now would be to double down upon historical injustice.[164] Indeed, were the international community to deny continuity to SIDS, it would performatively *reverse* the ground gained by decolonisation.

Furthermore, as noted in Section 3.1, the international community has previously accepted State continuity notwithstanding considerable breakdowns of factual effectiveness, including those caused by international armed conflicts and civil war.

[158] P Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009) 260–61, 264–65.

[159] Green (n 14) 205–06.

[160] McAdam (n 3) 144–46.

[161] See, e.g. PIF, 'Twenty-Second Pacific Islands Forum: Forum Communiqué' (PIF Secretariat, Suva, 29–30 July 1991) (agreeing that 'global warming and sea-level rise' were 'the most serious environmental threats' and that 'the cultural, economic and physical survival of Pacific nations is at great risk').

[162] T Frere, CY Mulalap and T Tanielu, 'Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati' (2020) 129 YaleLJ Forum 648, 665, 669.

[163] J Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (New York UP 2005) 44.

[164] McAdam (n 3) 120.

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Moreover, the widespread recognition that many governments in exile have received suggests that the basic criteria of population, territory and government need not spatially coincide for statehood to endure. Given these points, a plausible case emerges for presuming the continuity of SIDS by procedural implication. If the international community was committed to continuity in these more established cases, then it should also be committed in relation to future cases of sea-level rise. The only basis for rejecting this concern could be that sea-level rise is distinct in a normatively relevant manner from other threats to State continuity, such that its physical consequences should be treated differently from political and social disruptions. However, not only would this be for those opposed to State continuity to demonstrate, but it is also not at all clear what the relevant distinction(s) might be.

First, although sea-level rise is a physical phenomenon, whereas social unrest or foreign invasion are not, its proximate cause is *human-caused* climate change. As such, although it might be 'mechanically' distinctive from civil war or international armed conflict, its origins in the actions and omissions of States render its *normative* distinctiveness highly doubtful, particularly to the extent that those acts and omissions themselves constitute international wrongs.[165] Second, although it is often argued that the potentially permanent nature of sea-level rise distinguishes it from the allegedly more transient disruption of endemic violence,[166] this basis for differentiation is equally suspect. For one thing, such temporal distinctions rely to a problematic degree upon hindsight. Given technological advances in land reclamation, including the possibility of creating artificial islands, it is not certain that submergence or uninhabitability *would* be permanent for SIDS.[167] Conversely, although it might be presumed that purely political or social disruptions are either temporary or otherwise reversable, they need not be so. In fact, examples of their apparent permanence abound. Notwithstanding the ongoing violation of Palestinian self-determination that the violent creation of the State of Israel engendered in 1948,[168] the almost undisputed view is that Israel possesses statehood under international law.[169] Similarly, notwithstanding its almost total lack of recognition and presence by dint of force within the territory claimed by Somalia, the Republic of Somaliland shows no signs of disappearing. As both cases evince, there is nothing about changes in political geography that make them intrinsically less permanent than environmental shifts. This being so, and given the importance of affected peoples continuing to enjoy self-determination to the greatest extent possible, there is a strong normative case for State continuity to be presumed until the people(s) in question freely determine otherwise.

[165] For two views that the authors wholly endorse, see M Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019); O Táíwò, *Reconsidering Reparations* (OUP 2022).

[166] Jain (n 1) 31.

[167] This has been considered by the ILC: see ILC, 'Sea-Level Rise in Relation to International Law: Second Issues Paper' (n 92) 166–74. Some scholars cast doubt upon artificial islands functioning as substitutes for naturally occurring inhabitable land: see J Crawford, 'Islands as Sovereign Nations' (1989) 38 ICLQ 277, 279; Allen (n 1) 7; Stewart (n 3) 140–41. Such scepticism is not, however, universal: I Saunders, 'Artificial Islands and Territory in International Law' (2019) 52 VandJTransnat'lL 643. The authors agree with Saunders on this question.

[168] N Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford UP 2019) 23–61.

[169] Green (n 14) 120–21.

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4.2. Current practice

Although the presumption of State continuity unquestionably forms part of customary international law, several States remain reticent about its application to sea-level rise.[170] Nonetheless, significant practice in favour has begun to emerge. In this section, we review this by examining its customary legal status. As with all customary law, patterns of behaviour must be matched with evidence of their mandatory nature.[171] However, within the law of statehood, evidence of practice—such as the presence or absence of recognition, the signing and ratification of treaties and the issuing of multilateral declarations—often also provides evidence of opinio juris.[172] As such, the analysis will not parse too finely between the two.

Two additional points of framing are in order. First, given the current state of practice, it is necessary to distinguish 'local', 'regional' or 'special' custom from customary law that is binding upon the entire international community.[173] Although the latter typically requires more-or-less consistent global practice, the former places no lower limit upon participating States.[174] Second, it is crucial to emphasise practice from specially affected States at both regional and global levels.[175] The precise status of this is somewhat ambiguous, not least because some States take no clear position on the 'specially affected' category.[176] The ICJ's only explicit pronouncement has been to hold that for custom to form swiftly, States specially affected by the practices(s) at issue must participate in their promulgation.[177] Similarly, the ILC has refrained from addressing specially affected States, relegating discussion to the commentary of one Draft Conclusion.[178] Nonetheless, there are sound arguments of principle for endorsing the importance of such States within customary law formation. As Heller avers,

[170] See, e.g. Federal Republic of Germany, 'German Submission to the International Law Commission in Preparation of its 75th session (2023): Answers to Questions Posed in the Commission's Report of the 73rd Session (2022), Chapter III' (30 June 2023) 3–4.

[171] Lowe (n 51) 36–41, 47–50.

[172] ibid 40, 50–53; Green (n 14) 4–7.

[173] ILC, 'Third Report on Identification of Customary International Law' (27 March 2015) UN Doc A/CN.4/682, paras 80–84; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Merits) [1982] ICJ Rep 246, para 90; Lowe (n 51) 53–55.

[174] ILC, 'Draft Conclusions on the Identification of Customary International Law, with Commentaries', UNYBILC, vol II, pt II (2018) UN Doc A/73/10, conclusion 16; *Asylum Case (Colombia v Peru)* (Merits) [1950] ICJ Rep 266, 276–77; *Case concerning Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 39; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Mertis) [2009] ICJ Rep 213, paras 140–144; M Akehurst, 'Custom as a Source of International Law' (1976) 47 BYIL 1, 17–18.

[175] Both this, and the former important nuance conditioning the identification of the relevant customary international law, were missed in the Declaration of Judge Tomka (paras 5–7) in *Obligations of States in Respect of Climate Change* (n 9), which perhaps helps to explain, at least in part, his reticence to accept State continuity in the event of mass population exodus or total oceanic submergence. Needless to say, the authors disagree with Judge Tomka's overall assessment on a number of points.

[176] K Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 AJIL 191, 200.

[177] *North Sea Continental Shelf* (n 2) paras 73–74. But see also *Fisheries Jurisdiction (United Kingdom v Iceland; Germany v Iceland)* (Merits) [1974] ICJ Rep 90, para 67; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833, para 44.

[178] ILC, 'Report of the International Law Commission, Sixty-Eighth Session' (2016) UN Doc A/71/10, 95.

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placing weight upon the practices of States particularly implicated by a putative custom firmly coheres with sovereign equality.[179] Far from demanding sameness of treatment, equality requires the diverse and contextually dependent interests of States to be accorded weight proportionate to the discrete circumstances in which they arise.[180] Given this point, and given the normative argument presented in the previous section, there is a strong case to be made for placing significant weight upon the practice of States specially affected by sea-level rise. Moreover, given the postcolonial nature of such States, the most common and powerful objection to the doctrine of specially affected States—that it functions 'as a respectable disguise for "important" or "powerful" states'[181]—cannot plausibly apply.

Turning now to practice itself, in the Sixth Committee of the UN General Assembly (UNGA) in October 2021, several specially affected States argued in favour of a strong presumption in relation to sea-level rise.[182] The Independent State of Samoa, speaking on behalf of all Pacific SIDS, stated that '[u]nder international law, there is a presumption that a State, once established, will continue to be a State, particularly if it has a defined territory and population, among other factors'.[183] In a similar vein, the Republic of Cuba averred it 'vital to uphold the principle that, in the event that a small island State were to lose its territory as a result of sea-level rise, it would not lose its status as an international subject, with all the attributes thereof'.[184] More recently, the PIF released its 2023 Declaration stating that:

> … international law supports a presumption of continuity of statehood and does not contemplate its demise in the context of climate change-related sea-level rise … [such that] the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise.[185]

In a similar vein, the even more recent 2024 AOSIS Declaration stated that 'international law is based on a fundamental principle of the continuity of states and that this is consistent with broad state practice over the past century',[186] and continued by averring that:

> … consistent with the right to self-determination, the statehood and sovereignty of SIDS and our membership in the United Nations, its specialized agencies and other intergovernmental organizations will continue, and the rights and duties inherent thereto

[179] Heller (n 176) 202–03, 220–32. See also *Obligations of States in respect of Climate Change* (n 8) Verbatim Record CR 2024/36 (2 December 2024) 26; ibid Verbatim Record CR 2024/46 (9 December 2024) 18–19; ibid Verbatim Record CR 2024/52 (12 December 2024) 48–49.

[180] Heller (n 176) 202; A Green, 'A Political Theory of Sovereign Equality' (2023) 14 TLT 178, 187–88.

[181] G Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 96.

[182] ILC, 'Sea-Level Rise in Relation to International Law: Second Issues Paper' (n 92) 184–91.

[183] UNGA Sixth Committee, 'Report of the International Law Commission on the Work of its Seventy-Second Session' (10 December 2021) UN Doc A/C.6/76/SR.19, para 71 (Mr Luteru on behalf of the Pacific SIDS).

[184] UNGA, 'Report of the International Law Commission on the Work of its Seventy-Second Session (continued)' (10 December 2021) UN Doc A/C.6/76/SR.21, para 32.

[185] PIF (n 5) paras 12–13.

[186] Samoa (n 6) para 3.

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> will be maintained, notwithstanding the impacts of climate change related sea-level rise ….[187]

These texts have important consequences. There are 18 signatories to the 2023 PIF Declaration and 39 to the 2024 AOSIS Declaration respectively, yielding 42 net signatories. This establishes significant—and, apparently, entirely consistent—practice amongst specially affected States in the Caribbean, Indian Ocean and the Pacific, as well as the groundwork for a more global trend. As such, in terms of regional custom, there is a strong case for holding that, in the Pacific Region at the very least, the discrete and substantially overlapping impact of both Declarations firmly cements the presumption of State continuity as far as the consequences of sea-level rise are concerned.

Moreover, it is highly likely that, at least within PIF and AOSIS, the lack of any Member State objections amounts to multilateral acquiescence on the part of all States concerned.[188] This suggests that signatories to either or both Declarations are highly likely to benefit from a presumption of continuity notwithstanding sea-level rise vis-à-vis other signatories. This means that, at the very least, any submerged, uninhabitable or otherwise uninhabited State could be considered what Rowan Nicholson calls a 'state-in-context',[189] having all the properties of statehood, including full sovereign rights, relative to other States bound by virtue of these texts. Also worthy of note in this connection is Article 2(2)(b) of the Australia-Tuvalu Falepili Union Treaty,[190] under which both parties recognise that 'the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise'. Not only is Article 2(2)(b) cumulative with the practice of other PIF and AOSIS Member States in relation to the presumption of continuity under customary international law, but it also constitutes the first binding treaty obligation to continue recognition of statehood notwithstanding the physical effects of sea-level rise.

Taking a global view, the situation regarding general custom might be considered more embryonic. Some States outwith those specially affected have also come out in support. For example, the Principality of Liechtenstein contends that recognition should not be withdrawn because 'even if territory is completely inundated or the population of a country or State is displaced, statehood continues to be a valid expression of self-determination, until such a time as that country or State decides to express its right to self-determination through another political status'.[191] Note must also be made of the supportive—if more cautious—stances of the Republic of Cyprus,[192] the Republic of Latvia[193] and the United States, which has stated 'sea-level

[187] ibid para 4.

[188] The authors are grateful to an anonymous reviewer for bringing this point to their attention.

[189] Nicholson (n 89) 131–41, 143–45.

[190] Australia-Tuvalu Falepili Union Treaty (adopted 9 November 2023, entered into force 28 August 2024).

[191] Principality of Liechtenstein, 'Submission by the Principality of Liechtenstein to the International Law Commission on the Topic "Sea Level Rise in relation to International Law"' (29 June 2023) 2.

[192] UNGA, 'Statement by the Republic of Cyprus: Item 82 (Cluster II) – Report of the International Law Commission Session' (1 November 2021) 4.

[193] UNGA, 'Report of the International Law Commission on the Work of its Seventy-Second Session (continued)' (19 November 2021) UN Doc A/C.6/76/SR.22, para 75; *Obligations of States in respect of Climate Change* (n 8) Verbatim Record CR 2024/44 (6 December 2024) 11.

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rise driven by human-induced climate change should not cause any country to lose its statehood or its membership in the United Nations, its specialized agencies, or other international organizations'.[194] Overall practice nevertheless remains relatively thin.[195]

One final argument might nonetheless be made based on the *North Sea Continental Shelf* case. As noted, the ICJ held that custom can only alter insofar as the operative practice includes that of specially affected States.[196] Where all such States oppose change, '[r]egardless of whether the potential rule is prohibitive or permissive, there is no possibility of creating a new rule or modifying an existing one'.[197] Given the undisputed customary status of the presumption of State continuity, the total absence of State practice explicitly endorsing extinction as inevitable,[198] and the insistence of all affected States that extinction will *not* occur, it is clear that no norm could now emerge *requiring* State extinction following complete submergence, uninhabitability or exodus. Showing that extinction *might* nonetheless follow would therefore be entirely contingent upon proving that the law of State continuity *as it currently stands* necessitates that result. However, since no direct historical precedents for such extinction exist, this would be quite challenging and, given the normative importance of self-determination, would also risk appearing unmotivated (and therefore perhaps in bad faith).

5. Self-determination and a duty of ongoing recognition

This article has contended that, when interpreted coherently with the importance of self-determination, the presumption of State continuity sets a very high threshold for State extinction in circumstances of sea-level rise. Under ordinary circumstances, this threshold will not be met without voluntary dissolution on the part of affected States, at least as a matter of regional customary law. In this section, the authors claim in addition that, as a matter of general custom, it would be legally impermissible to withdraw recognition from affected States simply due to their uninhabitability, the submergence of their land or the diasporic nature of their population or government. This point matters because even though statehood can arguably persist in the total absence of recognition,[199] the relative opposability of statehood has both concrete legal and geopolitical significance.[200] As Nicholson observes, '[i]f a lawyer is called on to establish that two entities are States relative to each other—say, before an international court—then it may be much easier to show that the entities recognize each other than … to conduct a detailed analysis of the effectiveness criteria'.[201]

[194] White House, 'Fact Sheet: Enhancing the U.S.–Pacific Islands Partnership' (25 September 2023), issued in connection with the US–Pacific Islands Forum meeting held at the White House, Washington DC, 25–26 September 2023, Washington, DC; see also The White House, 'Fact Sheet: Energizing the US-Pacific Islands Forum Partnership' (10 November 2023).

[195] *Obligations of States in Respect of Climate Change* (n 9) (Declaration of Judge Tomka) para 5.

[196] *North Sea Continental Shelf* (n 2) 74.

[197] Heller (n 176) 230.

[198] There is considerable academic commentary supporting this (see sources cited in n 1 and n 3) but that is a different matter.

[199] Crawford (n 14) 93; Green (n 14) 104; Nicholson (n 188) 127–31.

[200] Green and Guilfoyle (n 150) 695.

[201] Nicholson (n 93) 143.

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Although the authors find the possibility eminently plausible, the argument so far has explicitly avoided suggesting that self-determination directly entails any specific obligations on the part of other States in relation to political communities affected by sea-level rise. Rather, the authors have limited themselves to arguing that the peremptory status of self-determination requires that other norms of international law—in this case, the presumption of State continuity and the effectiveness principle—be interpreted as coherent with it: the prescriptive content of international law, this article has contended, must go with the grain of its peremptory norms. The argument in this section goes further, suggesting that the customary law of State recognition imposes a positive obligation not to withdraw recognition from States affected by sea-level rise unless self-determination itself permits recognition to be withdrawn. This follows, the authors contend, from the justificatory relationship between the importance of self-determination, on the one hand, and the law of State recognition, on the other: the normative weight of self-determination, in the authors' view, is part of what makes it the case that this obligation not to withdraw recognition exists.

5.1. Initial recognition as a liberty

Notwithstanding some arguments to the contrary,[202] the vast preponderance of State practice suggests there to be no obligation to extend recognition to other political communities, even where those communities satisfy the traditional statehood criteria.[203] In justificatory terms, this generally accepted position can itself be explained via the importance of self-determination. One significant aspect of the latter principle concerns the legally protected capacity of all peoples to develop distinctive political traditions, an important component of which is their development of relationships with other peoples. Where the people(s) concerned possess statehood, their recognition of other States is a paradigmatic expression of this political capacity. To quote one of the present authors, writing elsewhere:

> The granting of recognition is not normatively inert … [since] politics can thrive in relation to international relations. The actions our governments take towards foreign communities, and the attitudes these actions express towards them, create a unique international profile that characterises our communities no less than the governmental profiles created by actions that are more self-regarding.[204]

When the value of developing such 'governmental profiles' is recognised as an aspect of self-determination, it follows that States must possess a liberty to recognise, which is logically inconsistent with having a duty to do so.[205] This holds true because the positive value attached to recognition qua act of self-determination requires that States remain free not to recognise: if they lacked this freedom, then their extension of recognition would lose its self-determining quality.

[202] H Lauterpacht, *Recognition of States in International Law* (CUP 1947) 12–22, 26–37.

[203] *Conference on Yugoslavia, Arbitration Commission, Opinion 10* (1992) 92 ILR 206, para 4; Nicholson (n 93) 190; Vidmar (n 92) 43–44.

[204] Green (n 14) 104.

[205] ibid 109.

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From this perspective, the nature of recognition as a discretionary political act sits normatively 'downstream', as it were, from self-determination. True, the discretionary nature of foreign recognition can also be justified in terms of the serious nature of the international commitment that recognition represents. To once again quote one of the present authors:

> Due to the formal commitment it represents, recognition is normatively unique amongst the causal precursors to diplomatic relations. Although non-recognised entities can possess statehood notwithstanding their treatment by foreign powers, a recognised community has formal assurances that it will be afforded the presumptive benefits typically attached to legal statehood … [which is to say, recognition] induces receiving states to rely upon an international commitment to their legal status.[206]

This emphasis upon legitimate expectations helps to explain the well-established doctrinal position that recognition prohibits States from acting as though the entities they recognise lack the entitlements that statehood characteristically entails.[207] However, rather than treat these two justifications for the liberty to recognise as explanatory alternatives, the authors contend that they are better viewed as mutually supporting aspects of recognition's overall normative profile. This holds because the austerity of the doctrinal position that a State must treat every entity it recognises as possessing statehood can only be squared with political self-determination if: first, recognition itself can be understood as an exercise of that collective capacity; and, second, recognition helps to promote self-determination within the recognised entity. An analogy with promising is instructive: since your capacity to make promises is an aspect of your freedom as an individual, the fact that your promises bind you cannot be considered a restriction upon your freedom. Moreover, since our ability to rely upon your promises enhances our freedom too, freedom as such is left better off overall. The same holds, the authors suggest, in relation to the legal consequences of recognition and political self-determination.

5.2. Ongoing recognition as an obligation

It might be assumed that the existence of this liberty implies that withdrawing recognition must also be at the discretion of the recognising State. This need not follow, however, as a matter of deontic logic, nor is that proposition unequivocally supported by State practice. For instance, Article 6 of the Montevideo Convention provides that, once extended, recognition is 'unequivocal and irrevocable', detailing no exceptions to this general rule.[208] This echoes Vaughan Lowe's famous sentiment that 'the road to statehood is a one-way street',[209] as well as the submissions to the ILC on this point by Liechtenstein, quoted in Section 4.2.[210] Similarly, Antigua and Barbuda have asserted that 'rising sea levels cannot be a justification for the erasure of a State and

[206] ibid 106.
[207] Nicholson (n 93) 131–41.
[208] Montevideo Convention (n 95) art 6.
[209] Lowe (n 52) 165.
[210] Liechtenstein (n 191).

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for denying the vulnerable State vital representation in the international legal order',[211] drawing upon the importance of self-determination to support that conclusion.[212] Most recently, the 2024 AOSIS Declaration states that:

> … consistent with the right to self-determination, the statehood and sovereignty of SIDS and our membership in the United Nations, its specialized agencies and other intergovernmental organizations will cease only if another form of expression of the right to self-determination of a SIDS population is explicitly sought and freely exercised by that population ….[213]

In this final substantive part of the present article, the authors support these contentions by arguing that self-determination entails that, at least in relation to sea-level rise, once recognition is granted its continued extension is as obligatory unless and until the self-determination of the affected people(s) demands otherwise.

This argument begins with the foregoing observation that the liberty to recognise stems in significant part from the value of political self-determination, and proceeds by noting that this helps to explain why the extent of that liberty is generally accepted to be limited by that same value. Established practice requires all States to refuse to recognise any change in territorial status that would undermine self-determination. This can be seen, for example, in the mandatory collective non-recognition that was practiced in relation to the purported emergence of Southern Rhodesia and the Turkish Republic of Northern Cyprus, where self-determination operated 'negatively' to render legally ineffective the attempted creation of States that excluded large sections of their extant populations along racial and ethnic lines.[214] The unequivocal rejection of these attempts through action in both the Security Council and the UNGA,[215] together with the near-total lack of recognition that either entity received, demonstrates the overriding importance of self-determination in matters of recognition. Recognition cannot be granted where it would undermine self-determination by supporting widespread marginalisation or exclusion from cultural, political or social participation.

Viewed purely as an 'external' legal check upon foreign recognition, this negative operation of self-determination might be instrumentally justified, for example, in terms of protecting fundamental human rights.[216] However, once self-determination is accepted to be an animating value within the law of recognition as such, it becomes possible to view these practices of collective non-recognition as a necessary requirement of that law, entailed by the relationship between self-determination, on the one hand, and recognition, on the other. Concrete entitlements grounded upon fundamental legal values cannot, without self-contradiction, operate in a manner that implicitly denies those same values.[217] It would be incoherent for international law to treat recognition as

[211] Antigua and Barbuda (n 103) para 50.
[212] ibid paras 36–50.
[213] Samoa (n 5) para 4.
[214] Crawford (n 14) 128–31; Green (n 14) 116–21.
[215] UNSC Res 541 (18 November 1983) UN Doc S/RES/541; UNSC Res 550 (11 May 1984) UN Doc S/RES/550; UNGA Res 2022 (XX) (5 November 1965) UN Doc A/RES/2022(XX); UNGA Res 2024 (XX) (11 November 1965) UN Doc A/RES/2024(XX).
[216] J Fawcett, 'Security Council Resolutions on Rhodesia' (1965) 41 BYIL 103, 112.
[217] Green (n 14) 40–42.

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an unrestricted liberty if doing so thereby undermined the very same principle that justified that liberty's existence. To be justified by self-determination, any liberty to recognise must extend only as far as self-determination itself allows. Viewed from this perspective, the international response to the purported creation of Southern Rhodesia and Northern Cyprus were not contingent political decisions in relation to two problematic cases, but legally mandatory consequences of the internal logic of recognition in general.

Given the above, three points must be observed when contemplating potential withdrawals of recognition prompted by the geographical and demographic consequences of sea-level rise. First, as noted in Section 5.1, recognition secures the entitlements of statehood on a relative basis between recognising entities. Second, it is generally accepted that widespread recognition provides good evidence of ongoing and universally opposable legal statehood.[218] Third, in the absence of voluntary dissolution,[219] even an apparent loss of statehood within the context of sea-level rise is liable to severely undermine self-determination (see Section 2.2). The first two points indicate that any withdrawals of recognition from affected States are likely to undermine the ability of those States to secure respect for their ongoing statehood, especially if such withdrawals are widespread. When the third point is added, it becomes clear that, since the entitlements of statehood are only of use vis-à-vis self-determination to the extent that they are observed by other States, any unilateral withdrawal of recognition risks actively undermining self-determination. Therefore, by extension of the argument just canvassed in relation to collective non-recognition, such withdrawals would go firmly against the grain of the law and so should be presumptively prohibited. In the same way that the Republic of Turkey acted outside the scope of its liberty to recognise emerging entities by recognising Northern Cyprus, no State would be entitled to withdraw recognition from Kiribati or Vanuatu due to sea-level rise. If this argument holds, and meets with general acceptance within the international community, the onus would be upon States wishing to withdraw recognition to show that doing so would be consistent with self-determination for affected peoples.[220] In the absence of the consent of those peoples, it is unclear what considerations might support such withdrawal.

6. Conclusion

This article began by noting that anthropogenic sea-level rise seriously undermines the enjoyment of self-determination within affected States. It then addressed how this would be exacerbated if statehood was deemed extinguishable by total submergence, the complete loss of inhabitable land or mass population exodus. In support of the positions advanced by several affected States, the authors provided an interpretation of the law governing State continuity that relied upon the peremptory norm of self-determination as a hermeneutic constraint. Beginning with a challenge to traditional conceptions of

[218] Crawford (n 14) 27–28.

[219] There can be no wrong where affected States offer their consent: see J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 563–64.

[220] See also *Obligations of States in respect of Climate Change* (n 8) Verbatim Record CR 2024/43 (6 December 2024) 47.

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effectiveness, this argument emphasised the possibility of reconceptualising that legal standard as normatively downstream from self-determination, arguing that once this move is taken, it becomes less attractive to contend that the geographical and demographic impacts of sea-level rise render affected States ineffective. The article then turned to the presumption of State continuity, providing a normative argument for it being irrebuttable in the context of sea-level rise, unless and until voluntary dissolution is opted for by affected States, before analysing the extent to which contemporary practice supports that contention. Finally, the authors claimed that international law should be taken to prohibit any withdrawals of recognition in response to the physical reality of sea-level rise.

Each of these interpretive arguments pushed the boundaries of the law governing State continuity, but this is both right and proper. Sea-level rise represents an unprecedented challenge for international law, such that many arguments addressing it will necessarily be legally controversial. The authors attempted to show that focusing on self-determination not only goes with the grain of de lege lata but also supports a plausible and attractive account of that law's current prescriptive content and concrete implications. Following the recent conclusion of connected discussions within both the ILC and the ICJ, the authors remain hopeful that similar views will prevail.

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